

In re: JSG TRADING CORP.; GLORIA AND TONY ENTERPRISES, d/b/a/ G&T ENTERPRISES; ANTHONY GENTILE; AND ALBERT LOMORIELLO, JR., d/b/a HUNTS POINT PRODUCE CO.
PACA Docket No. D-94-0508.

and

In re: GLORIA AND TONY ENTERPRISES, d/b/a G&T ENTERPRISES; AND ANTHONY GENTILE.
PACA Docket No. D-94-0526.

Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; and (4) Request for Pardon or Lesser Sanction.

Filed May 1, 2002.

PACA – Pardon, granting of, not appropriate in civil proceeding – Reopen, motion to, late filed – Perjury, suggestion of, not compelling.

The Judicial Officer (JO) denied each of JSG Trading Corp.'s (Respondent) motions and requests. The JO rejected Respondent's contention that *Finer Foods, Inc. v. United States Dep't of Agric.*, 274 F.3d 1137 (7th Cir. 2001), compelled vacating *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), because the Court in *Finer Foods* found that a factual inquiry was necessary to determine whether Joan Colson committed perjury in a declaration filed in *Finer Foods*. The JO stated the accuracy of Joan Colson's declaration filed in *Finer Foods*, a case which has no connection with *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), is not relevant to Joan Colson's credibility in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). The JO denied Respondent's motion to reopen the hearing because it was not filed before the JO issued the Decision and Order on Remand as to JSG Trading Corp., as required by 7 C.F.R. § 1.146(a)(2). The JO denied Respondent's motion for a stay pending further proceedings against Ms. Colson pursuant to *Finer Foods* stating the Court in *Finer Foods* did not order further proceedings against Ms. Colson. The JO denied Respondent's request for a pardon or a lesser sanction stating Respondent's request was a petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), which was not filed within 10 days after Respondent was served with *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), as required by 7 C.F.R. § 1.146(a)(3). The JO stated that even if the petition for reconsideration had not been late-filed, he would have rejected Respondent's request for a pardon. The JO, citing *United States v. Wilson*, 32 U.S. 150, 160 (Jan. Term 1833), stated a pardon is an act which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he or she has committed. The JO stated Respondent has not been convicted of a crime. Further, the JO stated Respondent raised no meritorious basis for its request for a reduction of the sanction imposed in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999).

Andrew Y. Stanton, for Complainant.
John M. Himmelberg and Gary C. Adler, for Respondent.
Rulings issued by William G. Jensen, Judicial Officer.

PROCEDURAL HISTORY

On November 29, 1999, I issued a Decision and Order on Remand as to JSG Trading Corp.: (1) concluding that JSG Trading Corp. [hereinafter Respondent] committed willful, flagrant, and repeated violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) revoking Respondent's PACA license.¹

On January 13, 2000, Respondent filed a petition for review of *In re JSG*

¹*In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1094 (1999).

Trading Corp. (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), with the United States Court of Appeals for the District of Columbia Circuit. On January 21, 2000, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], requested a stay of the November 29, 1999, order revoking Respondent's PACA license, pending the outcome of proceedings for judicial review. On January 27, 2000, I granted Complainant's request for a stay.²

On January 5, 2001, the United States Court of Appeals for the District of Columbia Circuit issued a decision upholding the November 29, 1999, Decision and Order on Remand as to JSG Trading Corp.³ Subsequently, Respondent filed a petition for a writ of certiorari, which the Supreme Court of the United States denied.⁴

On January 29, 2002, Complainant filed a Motion to Lift Stay Order as to Respondent JSG Trading Corp. [hereinafter Motion to Lift Stay] requesting that I lift the January 27, 2000, Stay Order as to JSG Trading Corp. and reinstate the November 29, 1999, Decision and Order on Remand as to JSG Trading Corp. Respondent failed to file a timely response to Complainant's Motion to Lift Stay, and on March 4, 2002, I issued an Order Lifting Stay as to JSG Trading Corp.⁵

On March 4, 2002, subsequent to my issuing the Order Lifting Stay as to JSG Trading Corp., Respondent filed a letter requesting that I pardon Respondent, Jill Goodman, and Steven Goodman or reduce the sanction imposed in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). On March 22, 2002, Respondent filed "Respondent JSG Trading Corp.'s Motion to Vacate the Decision and Order, To Reopen the Hearing or to Stay the Decision and Order, or In the Alternative to Consider JSG Trading Corp.'s Request for a Pardon or to Impose a Lesser Sanction" [hereinafter March 22, 2002, Motions]. On April 10, 2002, Complainant filed "Complainant's Opposition to JSG Trading Corp.'s Motion to Vacate Decision and Order, Reopen the Hearing or Stay the Decision and Order or, In the Alternative, Consider JSG Trading Corp.'s Request for Pardon or to Impose a Lesser Sanction" [hereinafter Response to March 22, 2002, Motions]. On April 17, 2002, Respondent filed "Respondent JSG Trading Corp.'s Reply to Complainant's Opposition to Motion to Vacate Decision and Order, Reopen the Hearing or Stay the Decision and Order or, In the Alternative, Consider JSG Trading Corp.'s Request for a Pardon or to Impose a Lesser Sanction" [hereinafter Reply to Complainant's Response].⁶ **Id**

²*In re JSG Trading Corp.*, 59 Agric. Dec. 487 (2000) (Stay Order as to JSG Trading Corp.).

³*JSG Trading Corp. v. Department of Agric.*, 235 F.3d 608 (D.C. Cir. 2001).

⁴*JSG Trading Corp. v. Department of Agric.*, 122 S. Ct. 458 (2001).

⁵*In re JSG Trading Corp.*, 61 Agric. Dec. ____ (Mar. 4, 2002) (Order Lifting Stay as to JSG Trading Corp.).

⁶The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], which are applicable to this proceeding, provide no right to reply to a response to a motion or request, as follows:

not order Respondent to file Respondent's Reply to Complainant's Response. Therefore, I do not consider Respondent's Reply to Complainant's Response. On April 25, 2002, Complainant filed "Complainant's Response to JSG Trading Corp.'s Reply."⁷ On April 25, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for rulings on Respondent's March 22, 2002, Motions.

RULING DENYING RESPONDENT'S MOTION TO VACATE

Joan Colson, an auditor for the United States Department of Agriculture, audited Respondent. Ms. Colson appeared as a witness on behalf of Complainant during the hearing in this proceeding and testified regarding her audit of Respondent. Complainant introduced into evidence a number of documents that Ms. Colson obtained and prepared during the course of her audit of Respondent.⁸

Respondent asserts that in *Finer Foods, Inc. v. United States Dep't of Agric.*, 274 F.3d 1137 (7th Cir. 2001), "the United States Court of Appeals for the Seventh Circuit made the extraordinary finding that a factual inquiry is warranted as to whether Joan Colson, a Department of Agriculture auditor, committed perjury and fraud on the Court" (Respondent's March 22, 2002, Motions at 1). Respondent moves to vacate *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), on the ground that *Finer Foods* "compels vacating the Decision and Order against JSG in the instant case which was based on Ms. Colson's testimony" (Respondent's March 22, 2002, Motions at 2).

In *Finer Foods*, a perishable agricultural commodity distributor, Finer Foods, Inc. [hereinafter Finer Foods], sought a stay pending judicial review of a United

§ 1.143 Motions and requests.

....

(d) *Response to motions and requests.* Within 20 days after service of any written motion or request, or within such shorter or longer period as may be fixed by the Judge or the Judicial Officer, an opposing party may file a response to the motion or request. The other party shall have no right to reply to the response; however, the Judge or Judicial Officer, in their discretion, may order that a reply be filed.

7 C.F.R. § 1.143(d).

I did not order Respondent to file Respondent's Reply to Complainant's Response. Therefore, I do not consider Respondent's Reply to Complainant's Response.

⁷Since the Rules of Practice provide no right to reply to a response to a motion or request (7 C.F.R. § 1.143(d)) and I do not consider Respondent's Reply to Complainant's Response, I also do not consider Complainant's Response to JSG Trading Corp.'s Reply.

⁸See *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999) (describing Ms. Colson's audit of Respondent, referencing Ms. Colson's testimony, and referencing the documents Ms. Colson obtained and prepared during her audit of Respondent).

States Department of Agriculture order suspending Finer Foods' PACA license, effective beginning November 16, 2001. The United States Department of Agriculture opposed the stay arguing that Finer Foods could not show irreparable harm because it went out of business before November 16, 2001. To support this contention, the United States Department of Agriculture filed a declaration of Ms. Colson which states that she had visited Finer Foods' business premises and found the premises locked and abandoned and that Finer Foods' former customers and suppliers said they are now doing business with Mid West Institutional Food Distributors. In response, Finer Foods accused Ms. Colson of perjury and filed an affidavit of Finer Foods' corporate secretary, Mary Ann Fitzgerald, stating that Finer Foods had operated without interruption until November 16, 2001, when the United States Department of Agriculture suspended Finer Foods' PACA license. These inconsistent statements drew the following response from the Court:

Someone is not telling this court the truth. *Who* is trying to deceive the court we do not know—though the fact that Finer Foods is paying counsel in an effort to have its license reinstated supports an inference that the status of the license matters (which it does only if Finer Foods remains in business). Going deeper into this dispute requires a factual inquiry that appellate courts are not set up to conduct. Perhaps it will prove necessary for this court to appoint a special master to hold an evidentiary hearing, or refer the dispute to the United States Attorney General for a criminal perjury investigation. For now, however, the Fitzgerald affidavit supplies an adequate basis to adjudicate the current request on the merits. If as the Department believes Finer Foods is defunct, then an order restoring its license will have no effect and cannot harm the public interest. But if the Department is wrong, and Finer Foods remains a viable concern, then allowing the suspension to continue may kill it—and the United States does not afford a damages remedy to firms put out of business by administrative high-handedness.

Finer Foods, Inc., 274 F.3d at 1140.

I do not find the Seventh Circuit's response to Ms. Colson's and Ms. Fitzgerald's statements a "finding that a factual inquiry is warranted as to whether Joan Colson . . . committed perjury and fraud on the Court" as Respondent contends. Instead, the Seventh Circuit speculates that perhaps an evidentiary hearing or a criminal perjury investigation is necessary to determine whether Ms. Colson's or Ms. Fitzgerald's statement accurately reflects Finer Foods' status on November 16, 2001. In any event, the accuracy of Ms. Colson's statement filed in *Finer Foods*, a case which has no connection with the instant proceeding, is not relevant to Ms. Colson's credibility in this proceeding. Moreover, Ms. Colson's credibility in this proceeding is supported by documentary evidence introduced in this proceeding. Therefore, I reject Respondent's contention that *Finer Foods* compels vacating *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), and I deny Respondent's motion to vacate *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999).

RULING DENYING RESPONDENT'S MOTION TO REOPEN THE HEARING

Respondent moves to reopen the hearing to allow Respondent "to pursue

evidence and testimony concerning Ms. Colson's credibility" (Respondent's March 22, 2002, Motions at 2). Section 1.146(a)(2) of the Rules of Practice provides that a party may petition to reopen a hearing prior to the issuance of the decision of the Judicial Officer, as follows:

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite.* . . .

(2) *Petition to reopen hearing.* A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2).

I issued *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), on November 29, 1999. Respondent filed its petition to reopen the hearing to allow Respondent "to pursue evidence and testimony concerning Ms. Colson's credibility" on March 22, 2002, 2 years 3 months 21 days after I issued *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). Therefore, Respondent's petition to reopen the hearing is untimely and is denied.⁹

⁹See *In re PMD Produce Brokerage Corp.*, 61 Agric. Dec. ___, slip op. at 11-12 (Feb. 14, 2002) (Order Denying Pet. for Recons. and Pet. for New Hearing on Remand) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing 1 month 15 days after the Judicial Officer issued the decision on remand); *In re Judie Hansen*, 58 Agric. Dec. 390, 392 (1999) (Order Denying Pet. to Reopen Hearing) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing 4 months 1 week after the Judicial Officer issued the decision); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 1704, 1709 (1998) (Order Denying Pet. for Recons. and for Reopening Hearing) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing 26 days after the Judicial Officer issued an order denying late appeal); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 718 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing 57 days after the Judicial Officer issued the decision); *In re Potato Sales Co.*, 55 Agric. Dec. 708 (1996) (Order Denying Pet. to Reopen Hearing) (denying the respondent's petition to reopen the hearing because the respondent filed the petition to reopen the hearing approximately 2 months after the Judicial Officer issued the decision); *In re King Meat Co.*, 40 Agric. Dec. 1910 (1981) (Order Denying Pet. for Recons., Rehearing and Reopening) (stating since the petition to reopen the hearing was filed after the issuance of the Judicial Officer's decision, it cannot be considered).

RULING DENYING RESPONDENT'S MOTION FOR A STAY

Respondent requests that I stay *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), "pending further proceedings against Ms. Colson pursuant to the Seventh Circuit's decision" (Respondent's March 22, 2002, Motions at 2). The Seventh Circuit did not order further proceedings against Ms. Colson in *Finer Foods*. Instead, the Seventh Circuit speculates that perhaps an evidentiary hearing or a criminal perjury investigation is necessary to determine whether Ms. Colson's or Ms. Fitzgerald's statement accurately reflects Finer Foods' status on November 16, 2001. Further, even if a proceeding were instituted against Ms. Colson in connection with the her declaration filed in *Finer Foods*, that proceeding would not be relevant to the instant proceeding. Therefore, I deny Respondent's motion for a stay of *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999).

RULING DENYING RESPONDENT'S REQUEST FOR A PARDON OR LESSER SANCTION

Respondent requests that I consider Respondent's previously-filed request for a pardon or lesser sanction (Respondent's March 22, 2002, Motions at 5).

On January 29, 2002, Complainant filed Complainant's Motion to Lift Stay. The Hearing Clerk served Respondent with Complainant's Motion to Lift Stay on February 7, 2002.¹⁰ Respondent's response to Complainant's Motion to Lift Stay was required to be filed within 20 days after the Hearing Clerk served Respondent with Complainant's Motion to Lift Stay.¹¹ Respondent failed to file a timely response to Complainant's Motion to Lift Stay. On March 4, 2002, at 10:39 a.m., I filed an Order Lifting Stay as to JSG Trading Corp. granting Complainant's Motion to Lift Stay.¹² On March 4, 2002, at 10:56 a.m., Respondent filed a letter dated February 14, 2002, in response to Complainant's Motion to Lift Stay requesting that I pardon Respondent, Jill Goodman, and Steven Goodman or reduce the sanction imposed in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999) (Letter from Steven Goodman to Judicial Officer dated February 14, 2002).¹³ Since Respondent's letter dated February 14, 2002, was a late-filed response to Complainant's Motion to Lift Stay filed after I issued the Order Lifting Stay as to JSG Trading Corp., I did not consider Respondent's March 4, 2002, filing in connection with Complainant's Motion to Lift Stay.

However, based on Respondent's March 22, 2002, Motions, I now consider Respondent's request for a pardon or a lesser sanction. After examining

¹⁰See Domestic Return Receipt for Article Number 70993400001388058492.

¹¹See 7 C.F.R. § 1.143(d).

¹²See the Hearing Clerk's time and date stamp on Order Lifting Stay as to JSG Trading Corp. at 1.

¹³See the Hearing Clerk's time and date stamp on Respondent's letter to the Judicial Officer dated February 14, 2002, at 1st unnumbered page.

Respondent's March 4, 2002, filing, I find that it is a petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). Section 1.146(a)(3) of the Rules of Practice provides that a petition for reconsideration of the Judicial Officer's decision must be filed within 10 days after service of the decision, as follows:

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite. . . .*

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

The Hearing Clerk served Respondent with the November 29, 1999, Decision and Order on Remand as to JSG Trading Corp. on December 6, 1999.¹⁴ Respondent filed its request that I reconsider the sanction imposed in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), on March 4, 2002, 2 years 2 months 26 days after the date the Hearing Clerk served the November 29, 1999, Decision and Order on Remand as to JSG Trading Corp. on Respondent. Accordingly, Respondent's petition for reconsideration was late-filed and is denied.¹⁵

¹⁴See Domestic Return Receipt for Article Number Z 599 734 371.

¹⁵See *In re Jerry Goetz*, 61 Agric. Dec. ____ (Jan. 17, 2002) (Order Lifting Stay) (denying, as late-filed, a petition for reconsideration filed 4 years 2 months 4 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Beth Lutz*, 60 Agric. Dec. 68 (2001) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 2 months 2 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Mary Meyers*, 58 Agric. Dec. 861 (1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 2 years 5 months 20 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Anna Mae Noell*, 58 Agric. Dec. 855 (1999) (Order Denying the Chimp Farm Inc.'s Motion to Vacate) (denying, as late-filed, a petition for reconsideration filed 6 months 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Paul W. Thomas*, 58 Agric. Dec. 875 (1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 19 days after the date the Hearing Clerk served the applicants with the decision and order); *In re Nkiambi Jean Lema*, 58 Agric. Dec. 302 (1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue) (denying, as late-filed, a petition for reconsideration filed 35

Moreover, even if Respondent's request for reconsideration of the sanction imposed in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), had been timely filed, I would deny it. As an initial matter, Respondent's request for a pardon is inapposite to this proceeding. A pardon is an act which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he or she has committed.¹⁶ This proceeding is not a criminal proceeding and Respondent has not,

days after the date the Hearing Clerk served the respondent with the decision and order); *In re Kevin Ackerman*, 58 Agric. Dec. 349 (1999) (Order Denying Pet. for Recons. as to Kevin Ackerman) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. 1280 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jim Fobber*, 55 Agric. Dec. 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing a petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the decision and order).

¹⁶See *United States v. Wilson*, 32 U.S. 150, 160 (Jan. Term 1833) (stating a pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed, from the punishment the law inflicts for a crime he has committed); *In re North*, 62 F.3d 1434, 1437 (D.C. Cir. 1994) (per curiam) (citing with approval the definition of *pardon* in *United States v. Wilson*); *United States v. Garfinkel*, 166 F.2d 887, 889 n.2 (3d Cir. 1948) (stating the definition of *pardon* in *United States v. Wilson* is the one usually quoted); *Groseclose v. Plummer*, 106 F.2d 311, 313 (9th Cir.) (stating a pardon does nothing more than abolish all restrictions upon the liberty and civil rights of the pardoned one that follow a felony conviction and sentence), *cert. denied*, 308 U.S. 614 (1939); *Lettsome v. Waggoner*, 672 F. Supp. 858, 863 (D. V.I. 1987) (per curiam) (citing with approval the definition of *pardon* in Black's Law Dictionary (5th ed.): an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed); *Petition of De Angelis*, 139 F. Supp. 779, 780 (E.D.N.Y. 1956) (stating a pardon is an act of grace, exempting the individual on whom it is bestowed from the punishment the law has inflicted for a crime he has

in this proceeding, been convicted of a crime.

Further, Respondent raises no meritorious basis for a reduction of the sanction imposed in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). Respondent raises six issues in support of its request for a lesser sanction. First, Respondent contends that Anthony Gentile and Albert Lomoriello, Jr., were independent agents or independent brokers and not employed purchasing agents; hence, Respondent's payments to Messrs. Gentile and Lomoriello could not constitute an activity that falls within the traditional definitions of commercial bribery (Letter from Steven Goodman to Judicial Officer dated February 14, 2002, at 2nd unnumbered page).

Respondent's March 4, 2002, filing is not the first time Respondent has raised the issue of Mr. Gentile's and Mr. Lomoriello's status. I previously rejected Respondent's contention that Respondent's payments to Mr. Gentile and Mr. Lomoriello could not have violated the PACA because Messrs. Gentile and Lomoriello were partners in L&P and American Banana, respectively, or independent brokers, as follows:

V. Messrs. Gentile and Lomoriello Were Not Partners or Independent Brokers.

Respondent contends that Messrs. Gentile and Lomoriello were partners in limited joint venture arrangements with L&P and American Banana, respectively. Respondent contends that, as a matter of law, Respondent's payments to Messrs. Gentile and Lomoriello could not constitute an activity that falls within the traditional definitions of commercial bribery because knowledge of payment to one partner must be attributed to the other partners and such payments could not be considered secret. Alternatively, Respondent asserts that Messrs. Gentile and Lomoriello were independent brokers and that payments to independent brokers are permissible under the PACA. (Respondent's Reply at 15-19.)

Starting in approximately 1985, and continuing until approximately 1991, Mr. Gentile was the head salesman, managed the sales operation, and was the tomato buyer at L&P (Tr. 442). Mr. Gentile had a joint account arrangement with L&P, in accordance with which Mr. Gentile shared profits and losses with L&P on the tomatoes that he purchased (Tr. 445). Mr. Gentile became ill in late 1990 or early 1991 and from that time through the date of the hearing, Mr. Gentile continued to purchase tomatoes for L&P from his home (Tr. 446, 2909). L&P continued to compensate Mr. Gentile

committed); *Gerrish v. State of Maine*, 89 F. Supp. 244, 245 (D. Maine 1950) (citing with approval the definition of *pardon* in *United States v. Wilson*); *United States v. Hughes*, 175 F. 238, 242 (W.D. Pa. 1892) (stating pardons are granted to individual criminals by name); *In re De Puy*, 7 F. Cas. 506, 510-11 (S.D.N.Y. June Term 1869) (No. 3814) (citing with approval the definition of *pardon* in *United States v. Wilson*).

See also Black's Law Dictionary 1137 (7th ed. 1999):

pardon, *n.* The act or an instance of officially nullifying punishment or other legal consequences of a crime.

on a joint account basis, but at a reduced rate of 15 per centum of the profits and losses (Tr. 447).

Mr. Gentile described himself as being employed by L&P (Tr. 2819). Mr. Prisco, the president of L&P, described Mr. Gentile as an employee of L&P and stated that L&P uses joint account arrangements with salespersons because the joint account arrangement gives a salesperson an incentive to work hard (Tr. 442-47). Mr. Beni, the secretary-treasurer of L&P, testified that Mr. Gentile was a salesperson for L&P and that L&P paid Mr. Gentile a salary for his fruit sales and had a joint account arrangement with Mr. Gentile with respect to his tomato sales (Tr. 2890, 2892-93). Mr. Beni testified that joint account arrangements are used because they give people "an incentive to sell more stuff" (Tr. 2893). Mr. Beni testified that his partner at L&P was in charge of the office, and when asked who his partner was, Mr. Beni identified his partner as Mr. Prisco (Tr. 2890-91).

Mr. Lomoriello became employed by American Banana in approximately December 1991 (Tr. 1256). Mr. Lomoriello had a joint account arrangement with American Banana in accordance with which Mr. Lomoriello shared profits and losses with American Banana on the produce that he purchased (Tr. 1245-46).

Mr. Contos, American Banana's vice-president, described Mr. Lomoriello as working for American Banana as a night salesperson and described himself as supervising Mr. Lomoriello (Tr. 314, 323). While Mr. Lomoriello characterized himself as an independent contractor, who sold services to American Banana (Tr. 1244), and a partner (Tr. 1277-78), he also described his duties at American Banana, which description supports Mr. Contos' view that Mr. Lomoriello was a salesperson working for American Banana (Tr. 1258-66). Mr. Contos testified that the president of American Banana was Alfred Allega and testified that he (Mr. Contos) had two partners. Mr. Contos identified Mr. Allega as one of those partners, but did not identify the other partner. (Tr. 323-24.)

A partnership is an association of two or more persons to carry on business for a profit. An essential element of partnership is sharing of profit and losses and sharing of profits and losses generally constitutes prima facie evidence of the existence of a partnership. However, the fact that an individual shares profits and losses is not dispositive of partnership status and whether partnership status exists turns on several factors, including the intention of the parties that they be partners, sharing in profits and losses, exercising joint control over the business, making capital investment, and possessing an ownership interest in the partnership.

The party alleging the existence of a partnership bears the burden of proof on the issue. The record does not support a finding that Mr. Gentile was a partner with L&P or the principals at L&P or a finding that Mr. Lomoriello was a partner with American Banana or the principals at American Banana. Instead, the record establishes that the joint account arrangements that Messrs. Gentile and Lomoriello had with L&P and American Banana, respectively, were merely methods by which L&P and American Banana compensated Messrs. Gentile and Lomoriello, respectively, for services. I find that Mr. Gentile was a purchasing agent

working for a principal, L&P, and that Mr. Lomoriello was a purchasing agent working for a principal, American Banana.

In re JSG Trading Corp. (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1091-94 (1999) (footnotes omitted).

Similarly, the United States Court of Appeals for the District of Columbia Circuit rejected Respondent's contention that Messrs. Gentile and Lomoriello were principals in L&P and American Banana or independent brokers and Respondent's payments to them could not have violated the PACA, as follows:

C. Status of the Payees

The essence of the commercial bribery offense, as defined by *Goodman* and *Tipco*, is the corruption or attempted corruption by the produce seller of its buyer's agent or employee. So framed, it does not cover payments made to an employer or a principal. Nor could it, as payments made to the produce buyer itself, as opposed to its agents or employees, do not possess the requisite secrecy. If Mr. Gentile and Mr. Lomoriello were principals in L&P and American Banana, then JSG did not commit commercial bribery.

We agree with the Judicial Officer that they were not principals. They were purchasing agents. *See* 58 Agric. Dec. at 1051 (characterizing Mr. Gentile and Mr. Lomoriello as purchasing agents). Mr. Gentile's and Mr. Lomoriello's joint account arrangements with L&P and American Banana do not alter the basic fact that these companies hired them to buy and sell tomatoes on the companies' behalf. Although each man shared profits and losses on his tomato transactions, there is no evidence that either became a full partner in his respective firm. Mr. Gentile, for instance, shared 15 percent of the profits and losses on his tomato sales for L&P. Nothing indicates he shared in profits and losses on any firm activity other than that which he was specifically engaged to perform, whereas full partners in a business typically share profits and losses in all the firm's activities. *See, e.g.*, UNIF. P'SHIP ACT § 202(a) (1997) (defining partnership as "the association of two or more persons to carry on as co-owners a business for profit"). Likewise, Mr. Lomoriello shared 40 percent of the profits and losses on his produce transactions for American Banana, but nothing indicates he shared in American Banana's overall profits and losses or otherwise became a co-owner. Far from indicating co-ownership, the limited profit- and loss-sharing arrangements were a performance-based compensation mechanism fully consistent with Mr. Gentile's and Mr. Lomoriello's status as agents or employees. *See* 58 Agric. Dec. at 1093-94; *see also* UNIF. P'SHIP ACT § 202(c)(2) & (3) (1997) (Stating that "the sharing of gross returns does not by itself establish a partnership," and that "a person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment . . . for services as an independent contractor or of wages or other compensation to an employee.").

JSG nonetheless contends that Mr. Gentile and Mr. Lomoriello were independent brokers and argues, without citation, that "payments to

independent brokers are permissible under the PACA.” See Final Brief of Petitioner at 46- 48. JSG apparently believes that independent brokers are principals because they are subject to PACA. The statute itself belies this claim. Brokers by definition negotiate “for or on behalf of the vendor or the purchaser.” 7 U.S.C. § 499a(b)(7). Agents, not principals, act on another’s behalf. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (Tentative Draft No. 1, 2000) (“Agency is the fiduciary relationship that arises when one person (the ‘principal’) manifests consent to another person (the ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent consents so to act.”). Nor does the requirement in 7 U.S.C. § 499c(a) that brokers obtain licenses make them principals. A broker’s status as a principal, an agent, or an employee depends on its relationship to other parties in a transaction, not its possession of a license.

JSG Trading Corp. v. Department of Agric., 235 F.3d 608, 615-16 (D.C. Cir. 2001) (footnotes omitted).

I agree with the Court’s findings concerning Mr. Gentile’s status and Mr. Lomoriello’s status, and I reject Respondent’s contention that Messrs. Gentile and Lomoriello were independent agents or independent brokers and not employed purchasing agents. Therefore, even if Respondent’s March 4, 2002, petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), had been timely filed, I would not reduce the sanction based on Respondent’s contention that Messrs. Gentile and Lomoriello were independent agents or independent brokers.

Second, Respondent contends its PACA license expired on January 19, 2002, and I cannot revoke a PACA license that has already expired (Letter from Steven Goodman to Judicial Officer dated February 14, 2002, at 2nd and 3rd unnumbered pages).

Respondent’s timely petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), on the ground that Respondent’s PACA license expired may have been a basis for changing the form of the sanction from revocation of Respondent’s PACA license to publication of the facts and circumstances of Respondent’s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). However, this change in the form of the sanction would not be a reduction of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). Publication of the facts and circumstances of Respondent’s violations and revocation of Respondent’s PACA license would have the same effect on Respondent and persons responsibly connected¹⁷ with Respondent.

¹⁷The term “responsibly connected” is defined in section 1a(b)(9) of the PACA, as follows:

§ 499a. Short title and definitions

....

(b) Definitions

For purposes of this chapter:

....

(9) The term “responsibly connected” means affiliated or connected

Section 4(b) of the PACA places identical licensing restrictions on an applicant who has been found to have committed any flagrant or repeated violation of section 2 of the PACA (7 U.S.C. § 499b) and on an applicant whose PACA license has been revoked, as follows:

§ 499d. Issuance of license

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who—

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

7 U.S.C. § 499d(b)(A)-(B).

Similarly, section 8(b) of the PACA places identical employment restrictions on persons responsibly connected with any person who has been found to have committed any flagrant or repeated violation of section 2 of the PACA (7 U.S.C. § 499b) and on persons responsibly connected with any person whose PACA license has been revoked, as follows:

§ 499h. Grounds for suspension or revocation of license

....

with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9).

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—

(1) whose license has been revoked or is currently suspended by order of the Secretary; [or]

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

7 U.S.C. § 499h(b)(1)-(2).

Therefore, even if Respondent's March 4, 2002, petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), had been timely filed, I would not reduce the sanction based on Respondent's contention that its PACA license expired on January 19, 2002.

Third, Respondent contends that any sanction imposed on Respondent, Jill Goodman, or Steven Goodman must be effective on January 19, 2002, the day Respondent's PACA license expired because Respondent failed to pay its PACA license fee¹⁸ (Letter from Steven Goodman to Judicial Officer dated February 14, 2002, at 3rd unnumbered page).

Respondent cites no basis for its contention that a sanction imposed under the PACA must become effective on the date a PACA licensee chooses to allow its PACA license to expire by failing to pay the PACA license fee. Moreover, I can find no basis in the PACA that supports Respondent's contention.

Respondent contends Jill Goodman and Steven Goodman will receive a sanction greater than the sanction "intended by PACA" if the effective date of the revocation of Respondent's PACA license is after January 19, 2002. Jill Goodman and Steven Goodman are not parties to this proceeding, and no sanction is imposed on Jill Goodman or Steven Goodman in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999). However, I infer Respondent contends that Jill Goodman and Steven Goodman are, and at all times material to this proceeding were, responsibly connected with Respondent and that pursuant to section 8(b) of the PACA (7 U.S.C. § 499h(b)), no PACA licensee may employ Jill Goodman and Steven Goodman after the order revoking Respondent's

¹⁸Section 3(b)(2) of the PACA (7 U.S.C. § 499c(b)(2)) requires PACA licensees to pay license fees annually or at such longer interval as the Secretary of Agriculture may prescribe.

PACA license becomes effective on May 8, 2002.¹⁹

Pursuant to section 8(b) of the PACA (7 U.S.C. § 499h(b)), the Secretary of Agriculture may approve employment of a person responsibly connected with any person whose license has been revoked after 1 year following the PACA license revocation. Respondent appears to contend that since Jill Goodman and Steven Goodman have not been employed by a PACA licensee since January 19, 2002, the revocation of Respondent's PACA license must become effective January 19, 2002, so that the Secretary of Agriculture may approve a PACA licensee's employment of Jill Goodman and Steven Goodman beginning January 20, 2003, 1 year after Jill Goodman and Steven Goodman ceased being employed by a PACA licensee. Respondent contends, if the revocation of Respondent's PACA license is effective after January 19, 2002, Jill Goodman and Steven Goodman would be barred from employment by a PACA licensee for a period longer than that provided in section 8(b) of the PACA (7 U.S.C. § 499h(b)).

I disagree with Respondent's contention. *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), does not prohibit a PACA licensee from employing Jill Goodman or Steven Goodman until the Order in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), becomes effective on May 8, 2002. Thus, no employment bar applied to Jill Goodman and Steven Goodman beginning January 19, 2002, as Respondent contends. Instead, Jill Goodman and Steven Goodman apparently voluntarily ceased employment with PACA licensees beginning January 19, 2002. Respondent has confused Jill Goodman's and Steven Goodman's voluntary decision not to continue employment by a PACA licensee beginning on January 19, 2002, with an employment bar. The Secretary of Agriculture may approve a PACA licensee's employment of Jill Goodman and Steven Goodman 1 year after PACA licensees are prohibited from employing Jill Goodman and Steven Goodman. The effect of *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), on Jill Goodman and Steven Goodman is not greater than that provided in section 8(b) of the PACA (7 U.S.C. § 499h(b)). Therefore, even if Respondent's March 4, 2002, petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), had been timely filed, I would not change the effective date of the order revoking Respondent's PACA license, as Respondent requests.

Fourth, Respondent requests that I review the United States Department of Agriculture's "admitted compliance with SUBRFA and former Vice President Gore's Regulatory Reform Act" (Letter from Steven Goodman to Judicial Officer dated February 14, 2002, at 3rd unnumbered page).

Respondent provides no reference to the portion of the extensive record in this proceeding in which the United States Department of Agriculture "admitted compliance with SUBRFA and former Vice President Gore's Regulatory Reform

¹⁹The order revoking Respondent's PACA license is effective 61 days after the Hearing Clerk served Respondent with the Order Lifting Stay as to JSG Trading Corp. See *In re JSG Trading Corp.*, 61 Agric. Dec. ___, slip op. at 4 (Mar. 4, 2002) (Order Lifting Stay as to JSG Trading Corp.). The Hearing Clerk served Respondent with the Order Lifting Stay as to JSG Trading Corp. on March 8, 2002. See Domestic Return Receipt for Article Number 70993400001388101433. Therefore, the order revoking Respondent's PACA license becomes effective May 8, 2002.

Act,” and I cannot locate the purported admission. Therefore, I am not able to review the admission Respondent contends the United States Department of Agriculture made.

Fifth, Respondent contends that its violations of the PACA “cannot possibly be considered willful in any standard except per-se [sic]” (Letter from Steven Goodman to Judicial Officer dated February 14, 2002, at 3rd unnumbered page).

In *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), I did not apply a per se test to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).²⁰ Instead, I applied the following test to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)):

Proof that: (1) a commission merchant, dealer, or broker made a payment to or offered to pay a purchasing agent; (2) the value of the payment or offer was more than *de minimis*; (3) the payment or offer was intended to induce the purchasing agent to purchase produce from the commission merchant, dealer, or broker making the payment or offer; and (4) the purchasing agent’s principal or employer was not fully aware of the payment or offer made by the commission merchant, dealer, or broker to the purchasing agent, raises the rebuttable presumption that the commission merchant, dealer, or broker making the payment or offer violated section 2(4) of the PACA.

The commission merchant, dealer, or broker may rebut the presumption by showing that: (1) the commission merchant, dealer, or broker did not make a payment to or offer to pay a purchasing agent; (2) the value of the payment or offer was *de minimis*; (3) the payment or offer was not intended to induce the purchasing agent to purchase produce from the commission merchant, dealer, or broker making the payment or offer; or (4) the purchasing agent’s principal or employer was fully aware of the payment or offer made by the commission merchant, dealer, or broker to the purchasing agent.

In re JSG Trading Corp. (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1051 (1999).

Applying this test to the facts in the instant proceeding, I concluded that Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).²¹ The United States Court of Appeals for the District of Columbia Circuit concluded that I did not use the wrong legal standard to determine whether Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the Court agreed with my conclusion that Respondent willfully violated section 2(4) of the PACA

²⁰*In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1052 n.8 (1999).

²¹*In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1094 (1999).

(7 U.S.C. § 499b(4)).²²

A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.²³ In light of the need to prove intent to induce, I cannot now conceive of a situation in which a respondent would be found to have violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) using the test I applied in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1051 (1999), and not be found to have willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondent has not provided any basis for its contention that its violations of the PACA “cannot

²²See *JSG Trading Corp. v. Department of Agric.*, 235 F.3d 608, 612-17 (D.C. Cir. 2001).

²³See, e.g., *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), cert. denied, 528 U.S. 1021 (1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Dep't of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), cert. denied, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), cert. denied, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), cert. denied, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re PMD Produce Brokerage, Inc.* (Decision and Order on Remand), 60 Agric. Dec. 780, 789 (2001); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 755 n.5 (2001), appeal docketed No. 02-3006 (6th Cir. Jan 3, 2002); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 593 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1602 (1998); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1560 (1998), appeal dismissed, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813, 827 (1998), appeal dismissed sub nom. *Litvin v. United States Dep't of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552, (1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997), appeal dismissed, No. 98-5456 (11th Cir. July 39, 1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), aff'd, 166 F.3d 1200 (2d Cir. 1998) (Table), 1998 WL 863340, cert. denied, 526 U.S. 1098 (1999); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), aff'd, 136 F.3d 89 (2d Cir. 1997); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), aff'd, 151 F.3d 735 (7th Cir. 1998); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), aff'd, 104 F.3d 139 (8th Cir.), cert. denied sub nom. *Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). See also *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) (“‘Willfully’ could refer to either intentional conduct or conduct that was merely careless or negligent.”); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) (“In statutes denouncing offenses involving turpitude, ‘willfully’ is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is ‘intentional, or knowing, or voluntary, as distinguished from accidental,’ and that it is employed to characterize ‘conduct marked by careless disregard whether or not one has the right so to act.’”)

possibly be considered willful in any standard except per-se [sic]” and I reject Respondent’s contention. Therefore, even if Respondent’s March 4, 2002, petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), had been timely filed, I would not reduce the sanction based on Respondent’s contention that its violations of the PACA “cannot possibly be considered willful in any standard except per-se [sic].”

Sixth, Respondent requests that I reduce the sanction against Respondent based on its 1993 transformation into a model produce company (Letter from Steven Goodman to Judicial Officer dated February 14, 2002, at 3rd unnumbered page).

Respondent’s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are extremely serious and warrant revocation of Respondent’s PACA license. The United States Court of Appeals for the District of Columbia Circuit found the United States Department of Agriculture acted well within its discretion in revoking Respondent’s PACA licence, as follows:

D. License Revocation

Section 8(a) of PACA permits license revocation for “flagrant or repeated” violations of § 2 (7 U.S.C. § 499b). *See* 7 U.S.C. § 499h(a). The Judicial Officer found JSG’s bribes “willful, flagrant, and repeated violations of section 2(4) of the PACA” (7 U.S.C. § 499b(4)) and revoked its license. *See* 58 Agric. Dec. at 1094. We will not lightly disturb the Department’s choice of remedy under a statute committed to its enforcement, especially given the Department’s superior knowledge of the industry PACA regulates. *See Butz v. Glover Livestock Comm’n Co.*, 411 U.S. 182, 185, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973) (Upholding Department of Agriculture suspension order under the Packers and Stockyards Act and reasoning that “where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy[,] ‘the relation of remedy to policy is peculiarly a matter for administrative competence.’”); *County Produce, Inc. v. United States Dep’t of Agric.*, 103 F.3d 263, 267 (2d Cir. 1997) (courts “must defer to the agency’s judgment as to the appropriate sanctions for PACA violations” because the Department of Agriculture “is particularly familiar with the problems inherent in the produce industry, and it has experience conforming the behavior of produce companies to the requirements of PACA”).

Nothing in the record persuades us that JSG’s payments to the Gentiles and Albert Lomoriello were anything but flagrant and repeated. The bribes in this case were as flagrant as those in *Goodman* and *Tipco*. The Department revoked the defendants’ licenses in both cases, providing ample notice that commercial bribes may result in revocation. The only difference from those cases is that JSG apparently did not surcharge its customers to pay for the bribes. That distinction does not diminish the wilfulness of JSG’s conduct or the corruption it worked on its buyers’ purchasing agents. The Department acted well within its discretion in revoking JSG’s license.

JSG Trading Corp. v. Department of Agric., 235 F.3d at 616-17 (footnote omitted).

Revocation of Respondent’s PACA license is necessary to deter not only Respondent from future violations of the PACA, but also other potential PACA

violators. Although Respondent may not have committed any PACA violations since 1993, when Respondent states it transformed into a model produce company, and may not commit future violations of the PACA, revocation of Respondent's PACA license is necessary to deter other potential violators from future violations of the PACA. Therefore, even if Respondent's March 4, 2002, petition for reconsideration of the sanction in *In re JSG Trading Corp.* (Decision and Order on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999), had been timely filed, I would not reduce the sanction based on Respondent's contention that since 1993 Respondent has been a model produce company.
